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Robert C. Hochtritt

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YOUNG & THOMPSON
209 Madison Street
Suite 500
ALEXANDRIA, VA 22314

EXAMINER

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Appeal 2007-3501
Application 10/660,659
Technology Center 3600

Before: WILLIAM F. PATE, III, JENNIFER D. BAHR and
STEVEN D.A. McCARTHY, *Administrative Patent Judges.*

DECISION ON APPEAL

1 STATEMENT OF THE CASE

2 The Appellants appeal under 35 U.S.C. § 134 (2002) from the final

3 rejection of claims 8, 10 and 11 under 35 U.S.C. § 112, ¶ 2 as being

4 indefinite for failing to particularly point out and distinctly claim the subject

5 matter which the Appellants regard as the invention; and from the final

1 rejections of claims 1-6, 8-11 and 13 under 35 U.S.C. § 103(a) (2002) as
2 being unpatentable over Petterson (U.S. Patent 5,100,020) in view of Swift
3 (U.S. Patent 1,151,064); of claim 7 under section 103(a) as being
4 unpatentable over Petterson in view of Swift and Sigl (U.S. Patent
5 4,638,921); of claim 12 under section 103(a) as being unpatentable over
6 Petterson in view of Swift and Spencer (U.S. Patent 6,830,151); of claim 14
7 under section 103(a) as being unpatentable over Petterson in view of Swift
8 and Margulies (U.S. Patent 4,526,291); and of claims 15 and 16 under
9 section 103(a) as being unpatentable over Petterson in view of Swift and
10 Boone (U.S. Patent 6,892,898). Oral argument was held on June 11, 2008.
11 We have jurisdiction under 35 U.S.C § 6(b) (2002).

12 We REVERSE.

13 Claim 1 is the only independent claim on appeal. It recites:

14
15 1. A dispenser for holding and
16 dispensing folded absorbent sheet products, the
17 dispenser comprising a body and a stand, the stand
18 comprising a base for supporting the dispenser on
19 a horizontal surface, the body comprising two
20 sections, wherein a first upstream one of said
21 sections is straight and extends over the majority
22 of the length of said body, and wherein a second
23 downstream one of said sections extends at an
24 angle relative to said first section and
25 communicates with a dispensing opening, and
26 wherein, when said dispenser is supported by said
27 stand on said horizontal surface, each of said first
28 and second sections forms an oblique angle
29 relative to said horizontal surface, said first section
30 forming an angle that is more nearly vertical, and
31 said second section forming an angle that is more
32 nearly horizontal.

1

2 A. *The Rejection of Claims 8, 10 and 11 Under Section 112, ¶ 2*

3 Claim 8 depends from claim 1 and recites “[t]he dispenser according
4 to claim 1, wherein said angle formed by said first section is in the range of
5 45-85°.” The Examiner concludes that claim 8 is indefinite because, “if the
6 angle in this range is equal to 45 degrees, then the angle is not ‘more nearly
7 vertical’, as recited in claim 1.” (Ans. 3). Claim 10 depends from claim 1
8 and recites “[t]he dispenser according to claim 1, wherein said angle formed
9 by said second section is in the range of 15-60°.” The Examiner concludes
10 that claims 10 and 11 are indefinite because,

11

12 if the angle is equal to 45 degrees, then as recited
13 in claim 1, the angle is not ‘more nearly at a
14 horizontal’, because at 45 degrees the angle would
15 be between a vertical and a horizontal position.
16 Also, if the angle were more than 45 degrees, as
17 recited in claim 10, then the angle of the second
18 section would be more nearly vertical than a
19 horizontal position, as recited in claim 1.
20

21 (Ans. 3-4).

22 A claim is subject to rejection under 35 U.S.C. § 112, ¶ 2 only if the
23 language of the claim, read in light of the specification and the teachings of
24 the prior art, is susceptible of no reasonable interpretation. *See Datamize,*
25 *LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005); *In re*
26 *Moore*, 439 F.2d 1232, 1235 (C.C.P.A. 1971). We agree with the
27 Appellants (App. Br. 4) that the clause “said first section forming an angle
28 that is more nearly vertical, and said second section forming an angle that is
29 more nearly horizontal” as used in claim 1 limits the angles of the first and

1 second sections relative to one another. “That is, the first section of the
2 dispenser body forms an angle that is more nearly vertical than the second
3 section, and, correspondingly, the second section forms an angle that is more
4 nearly horizontal than the first section.” (*Id.*) This interpretation is
5 supported by the present specification at page 7, line 14 through page 8, line
6 3. When the clause “said first section forming an angle that is more nearly
7 vertical, and said second section forming an angle that is more nearly
8 horizontal” as used in claim 1 is interpreted in this manner, claims 8, 10 and
9 11 further limit claim 1 as required by 35 U.S.C. § 112, ¶ 4 (2002).

10 On the record before us, the Appellants have shown that the Examiner
11 erred in rejecting claims 8, 10 and 11 under section 112, ¶ 2.

12
13 *B. The Rejection of Claims 1-6, 8-11 and 13 Under Section*
14 *103(a) as Being Unpatentable Over Petterson and Swift*

15 The Appellants contend that the rejection of claims 1-6, 8-11 and 13
16 under section 103(a) is erroneous because the teachings of Petterson and
17 Swift would not have motivated one of ordinary skill in the art to modify
18 Petterson’s apparatus in a manner which would meet the limitations of claim
19 1. (App. Br. 6). While heeding the Supreme Court’s instruction that “[t]he
20 obviousness analysis cannot be confined by a formalistic conception of the
21 words teaching, suggestion, and motivation,” *KSR Int’l Co. v. Teleflex, Inc.*,
22 127 S.Ct. 1727, 1741 (2007), we agree with the Appellants that the teachings
23 of Petterson and Swift do not establish a prima facie case for the
24 obviousness of the subject matter of claim 1.

25 Petterson teaches an apparatus for dispensing paper napkins.
26 (Petterson, col. 2, ll. 13-16). The apparatus includes a housing defining an

1 interior for accommodating a stack of the napkins. (Pettersen, col. 3, ll. 49-
2 53). The napkins as described by Pettersen are thicker along the folded edge
3 than along the opposite edge due to the nature of the fold. (Pettersen, col. 3,
4 ll. 34-37). The uneven thickness of the napkins causes stacks of such
5 napkins to bend with predetermined radii of curvature. (Pettersen, col. 3, ll.
6 39-47). The back wall of the housing of Pettersen's apparatus is smoothly
7 curved with a radius of curvature generally corresponding to the
8 predetermined curvature of a stack of the napkins. (Pettersen, col. 3, ll. 54-
9 57). Pettersen teaches that the curved housing is an improvement over a
10 straight, vertical housing in that "a greater number of paper napkins can be
11 stacked within a specified vertical distance than would be the case if the
12 housing was essentially straight and perpendicular." (Pettersen, col. 4, ll.
13 41-45).

14 Swift teaches an improved cabinet including a sheet metal casing for
15 dispensing paper drinking cups, each such cup consisting of a paper bag
16 closed at one end by an end flap. (Swift 1, ll. 10-14, 55-60 and 100-107).
17 The upper portion of the casing has straight, vertical sides enclosing a width
18 less than the widths of the drinking cups. Hence, the drinking cups are
19 placed at an angle of 45° to the vertical sides of the casing. (Swift 1, ll. 60-
20 69 and Figs. 1-3). The lower end of the casing through which the cups are
21 withdrawn is bent forwardly at an angle of 45° to the vertical section of the
22 casing and has sides sufficiently spaced to accommodate the full widths of
23 the drinking cups. (Swift 1, ll. 70-79).

24 We see no articulable reasoning having rational underpinnings in the
25 teachings of Pettersen and Swift which would support a conclusion that it
26 would have been obvious to modify Pettersen's housing to include a first

1 upstream section which is straight and a second downstream section
2 extending at an angle relative to the first section. Substitution of a straight
3 upstream section for the curved housing of Petterson's dispensing apparatus
4 would be contrary to Petterson's teaching that the curved housing is an
5 improvement over a straight, vertical housing such as that shown in Swift.

6 On the record before us, the Appellants have shown that the Examiner
7 erred in rejecting claims 1-6, 8-11 and 13 under section 103(a).

8

9 *C. The Rejection of Claim 7 Under Section 103(a) as Being*
10 *Unpatentable Over Petterson, Swift and Sigl*

11 As noted in the previous section of this opinion, we see no articulable
12 reasoning having rational underpinnings in the teachings of Petterson and
13 Swift which would support a conclusion that it would have been obvious to
14 modify Petterson's housing to include a first upstream section which is
15 straight and a second downstream section extending at an angle relative to
16 the first section. The Examiner has pointed to nothing in the teachings of
17 Sigl, alone or in combination with the teachings of Petterson and Swift,
18 which would supply this deficiency. On the record before us, the Appellants
19 have shown that the Examiner erred in rejecting claim 7 under section
20 103(a).

21

22 *D. The Rejection of Claim 12 Under Section 103(a) as Being*
23 *Unpatentable Over Petterson, Swift and Spencer*

24 The Examiner has pointed to nothing in the teachings of Spencer,
25 alone or in combination with the teachings of Petterson and Swift, which
26 would supply the deficiency in the teachings of Petterson and Swift. On the

1 record before us, the Appellants have shown that the Examiner erred in
2 rejecting claim 12 under section 103(a).

3

4 *E. The Rejection of Claim 14 Under Section 103(a) as Being*
5 *Unpatentable Over Petterson, Swift and Margulies*

6 The Examiner has pointed to nothing in the teachings of Margulies,
7 alone or in combination with the teachings of Petterson and Swift, which
8 would supply the deficiency in the teachings of Petterson and Swift. On the
9 record before us, the Appellants have shown that the Examiner erred in
10 rejecting claim 14 under section 103(a).

11

12

13 *F. The Rejection of Claims 15 and 16 Under Section 103(a)*
14 *As Being Unpatentable Over Petterson, Swift and Boone*

15 The Examiner has pointed to nothing in the teachings of Boone, alone
16 or in combination with the teachings of Petterson and Swift, which would
17 supply the deficiency in the teachings of Petterson and Swift. On the record
18 before us, the Appellants have shown that the Examiner erred in rejecting
19 claims 15 and 16 under section 103(a).

20

21 *G. Response to Dissent*

22 We disagree with the position taken by the dissent on two grounds.
23 First, we disagree with the dissent's assertion that "it would have been
24 obvious to adapt the dispenser of Swift for horizontal rather than vertical
25 support." Swift's cabinet is designed to provide particular advantages such
26 as a compact profile (Swift 2, ll. 50-68) when mounted with the upper,
27 vertical section of the cabinet resting against the wall. Nothing in the

teachings of Swift or Petterson suggests that adapting Swift's cabinet for horizontal rather than vertical support would be an *improvement* of the cabinet as the dissent contends. We see no articulable reasoning having rational underpinnings in the teachings of Petterson and Swift which would support a conclusion that it would have been obvious to modify Swift's cabinet as described in the dissent.

Second, even if we agreed with the dissent's reasoning, that reasoning would not provide us with a basis for affirming the Examiner's rejection. The Examiner concludes that it would have been obvious to modify Petterson's apparatus in view of the teachings of Swift to incorporate two sections angled relative to one another. (Ans. 5). If we agreed with the reasoning presented by the dissent, we would conclude that the reasoning presented by the dissent differs so significantly from the reasoning presented by the Examiner in support of the rejections of claims 1-16 that the dissent's reasoning would constitute a new ground of rejection.

DECISION

We REVERSE the rejections of claims 1-16.

REVERSED

1 Pate, III, *Administrative Patent Judge*, dissenting-in-part

2

3 I respectfully dissent-in-part. I agree with my colleagues that the
4 rejection under § 112 cannot be sustained. On the other hand, I would
5 sustain the rejections of the claims rejected under § 103.

6 Swift discloses all the features of Appellants' invention save for the
7 fact that: 1) it does not dispense absorbent products (it dispenses rectangular
8 cups of the same shape as Appellants' disclosed napkins); and, 2) it does not
9 have a stand that is configured to support the dispenser on a horizontal
10 surface and angle the dispensing opening 13 somewhat more forwardly and
11 upwardly as the Examiner suggests for more convenient access. Swift was
12 designed to be fastened on a vertical surface such as a wall beside a water
13 cooler or the like. As such, the first section must be configured to be vertical
14 to attach to the wall.

15 Petterson discloses a dispenser that dispenses folded absorbent
16 products. Petterson further discloses a stand for supporting the dispenser on
17 a horizontal surface. The Petterson device is configured as a curve, since the
18 dispensed napkins are folded to have one portion thereof thicker than
19 another portion. The curve also results in the dispenser opening being
20 somewhat forwardly and more vertically presented within the confines of
21 still allowing gravity to feed the napkins.

22 In my view, it would have been obvious to adapt the dispenser of
23 Swift for horizontal rather than vertical support. This is merely applying a
24 known technique to a known device, ready for improvement, with
25 predictable results. *See KSR* at 1740. Additionally, it further would have
26 been obvious, when the first section of Swift is freed from the constraint of

1 vertical mounting, to angle the device obtusely with the horizontal as the
2 Examiner has stated "to provide for a more user friendly way for one to
3 reach the opening of the dispenser." I am of the view that this teaching of
4 making the opening as nearly vertically extending as possible within the
5 confines of gravity feed is an implicit recognition in the art which is a
6 known technique applicable to all devices dispensing flat paper products.
7 When applied to the similar Swift dispenser this modification would have
8 achieved predictable results.

9 Unlike the majority, I do not consider the order in which prior art is
10 applied in a rejection to be significant. *See, for example, In re Bush*, 296
11 F.2d 491, 496 (CCPA 1961.) ("[i]n a case of this type where a rejection is
12 predicated on two references each containing pertinent disclosure which has
13 been pointed out to the applicant, we deem it to be a matter of no
14 significance, but merely a matter of exposition, that the rejection is stated to
15 be on A in view of B instead of B in view of A, or to term one reference
16 primary and the other secondary."); *In re Cook*, 372 F.2d 563 (CCPA 1967).

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23 LV:

24 YOUNG & THOMPSON
25 209 Madison Street
26 Suite 500
27 ALEXANDRIA, VA 22314